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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1026

UNITED STATES OF AMERICA *ex rel.* JACOB MOLINAS,

Petitioner,

—against—

VINCENT R. MANCUSI (Successor to Albert J. Meyer), Warden of Attica State Prison, Attica, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA *ex rel.* JACOB MOLINAS,

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VINCENT R. MANCUSI (Successor to Albert J. Meyer), Warden of Attica State Prison, Attica, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, JACOB MOLINAS, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 5, 1967 which unanimously affirmed an order of the United States District Court for the Western District of New York dated March 7, 1966, denying on the merits petitioner's application for a writ of habeas corpus.

Opinions Below

The decision of the United States District Court for the Western District of New York (Appendix A) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (Appendix B) is not yet reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 5, 1967. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Questions Presented

In 1960, the District Attorney of the County of New York initiated an investigation into the alleged bribery of college basketball players by persons seeking to control the scoring in games and thereby illicitly winning wagers on such contests. The investigation focused principally upon the activities of petitioner, Jacob Molinas, and three of his accomplices, Joseph Hacken, Joseph Green and Aaron Wagman. By the middle of 1961, these three accomplices had been indicted as participants in the alleged conspiracy to "fix" games and they subsequently pleaded guilty to the charges against them. One of them, Wagman, agreed to cooperate with the authorities in their continuing investigation which, on May 15, 1962, culminated in the return of an indictment against petitioner.

Theretofore, during the course of the investigation, petitioner was subjected to secret interrogation by an agent of the prosecutor in the following manner: An accomplice, William Dennis Reed, who had previously retained petitioner as counsel, arranged to meet petitioner in the latter's law office, ostensibly to seek advice with respect to his own position in the investigation and his scheduled appearance before the Grand Jury. In fact, the prosecutor had coerced Reed into cooperating with the authorities and Reed had arranged the meeting at the prosecutor's instruction. Act-

ing as the agent of the prosecutor, Reed steered his conversation with petitioner to topics suggested by the prosecutor and designed to elicit incriminating statements which Reed recorded by means of a concealed electronic device supplied by the prosecutor.

At petitioner's trial, which was interrupted for five weeks, during which time the jury was dispersed, the prosecution introduced in evidence, over objection, a tape-recording of Reed's conversation with petitioner. This furnished the necessary corroboration essential for petitioner's conviction under the law of New York. That this surreptitious recording was obtained solely for the purpose of supplying the legal requirement of corroboration—and not to protect Reed's credibility—is beyond dispute.*

The following questions are presented:

1. Whether petitioner's Fifth and Sixth Amendment rights were violated by the admission into evidence of incriminating statements elicited from him by a client, purportedly seeking legal advice but secretly acting as the agent of the prosecutor,

a) after petitioner had become the primary target of the prosecutor's investigation,

b) in the absence of counsel and without prior warning of his constitutional right to remain silent, and

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* In his brief to the Appellate Division (p. 48) the District Attorney stated:

"The taped conversation provided a major portion of the corroboration needed to substantiate legally the overwhelming, complete and detailed testimony of 9 college players and one co-conspirator, Aaron Wagman."

c) in a manner calculated to conceal from petitioner the fact that he was under interrogation and thus deprive him of an opportunity to exercise his right to remain silent?

2. Whether the admission of the tape recording did not also violate petitioner's Fourth Amendment rights because

a) it was the product of surreptitious electronic surveillance without prior court order by an agent of the prosecutor,

b) who gained entry into petitioner's constitutionally inviolate private law office by fraud, deception and misrepresentation,

c) for the sole purpose of eliciting and seizing incriminating statements from petitioner without his knowledge or consent which, upon being recorded, would furnish the essential corroboration required to convict him?

3. After a criminal jury trial has been in progress for more than a month and almost 3,000 pages of testimony have been taken, does not its interruption for five weeks during which time the jury is dispersed and not subject to the control of the Court, so completely destroy the continuity of the trial and deprive petitioner of his constitutional right to due process of law and a fair trial, as to require, as a matter of constitutional law, the granting of his timely motion for a mistrial?

Statement

On May 15, 1962, a five-count indictment was returned against petitioner. Count I charged petitioner with conspiracy; Counts II, III and IV charged petitioner with the bribery of Reed, a player on the basketball team of Bowling Green University; Count V charged attempted subornation of perjury in connection with Reed's appearance before the Grand Jury.

On January 8, 1963, petitioner was convicted on all counts of the indictment and, although a first offender, he was nevertheless sentenced to imprisonment for an aggregate term of 10 to 15 years, which term was subsequently reduced to 7 to 12½ years.*

Petitioner's conviction was secured principally by the introduction of the testimony of the co-conspirator Wagman and the accomplice Reed; additional testimony was given by other basketball players who were also participants in the alleged conspiracy.

However, standing alone, all of this testimony was insufficient, as a matter of law, to warrant petitioner's conviction because of New York's statutory requirement (N. Y. Code Crim. Pro. §399) that the testimony of accomplices must be corroborated by other evidence.

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* The judgment of conviction was affirmed by the Appellate Division First Department on June 16, 1964 (21 A. D. 2d 384). On July 7, 1964, leave to appeal to the New York Court of Appeals was denied. On July 27, 1964, after reargument, leave was again denied. On October 15, 1964, the Appellate Division denied reargument and on March 1, 1965, this Court denied certiorari. (380 U. S. 907).

The Manner in Which the Self-Incriminating Tape Recording Was Secured

In January 1962, a detective approached Reed in Bowling Green, Ohio, and, after a conference with university officials, Reed agreed to return to New York with the officer and to appear before the Grand Jury (1483-4).* Before leaving Ohio, however, Reed notified petitioner, at the time a member of the Bar of the State of New York, of the place and time of their scheduled arrival (1484-5, 1828-9). Reed had previously retained petitioner as his counsel (1468-70, 1795-7, 1991-2) to advise him with respect to his position in the investigation. He wished to confer with petitioner with respect to his testimony before the Grand Jury (1828).

On the evening of January 15, 1962, petitioner met Reed and the officer at Newark Airport, and after petitioner telephoned the District Attorney's office, Reed accompanied petitioner to New York, where they spent the night in the Martinique Hotel (1491, 1830).

Reed discussed his situation with petitioner and the latter advised him of his rights and informed him that he would accompany Reed to the District Attorney's office the following morning (1836). According to Reed (1492-4), petitioner also sought to influence Reed's testimony before the Grand Jury.

The following day petitioner appeared with Reed and was informed by the prosecutor that he would not be permitted to represent Reed. The prosecutor, Reed and peti-

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* All references, unless otherwise identified, are to pages of the original Record on Appeal to the Appellate Division, First Department, of the Supreme Court of the State of New York, which Record was before the United States District Court and the United States Court of Appeals for the Second Circuit as part of the record in these proceedings.

tioner thereupon went before Judge Dickens who suggested that it might be unethical for petitioner to represent Reed inasmuch as the investigation was directed against petitioner (1860; People's Exhibit 35, p. 20).* According to Reed, petitioner was still attempting to show that he was entitled to represent him when "there was some commotion" (1860) and Reed was "taken away" by the prosecutor and detectives (1497, 1860). Although Reed desired counsel (1861), he was taken to the prosecutor's office for questioning and was not permitted to call petitioner (1859).

Reed was questioned for "a very long time" (1843) by at least 8 persons (1846) in connection with his participation in the basketball "fixing". Although Reed was without counsel during this questioning, he "assumed that Mr. Molinas was still my lawyer, but at that time I was becoming quite unsure" (1840).

Reed was told that he would not be prosecuted if he would cooperate and testify against petitioner (1845, 1849). Nevertheless, throughout the initial stages of the protracted questioning, Reed took the position that he did not wish to make any statement (1848-9). He persisted in his refusal to make statements implicating himself or petitioner until, after more than six hours of questioning,** he "broke down" (1849-50) under the "emotional" coercion (1850-51) and

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* In its opinion (p. 26, *infra*), the court below stated that the "judge ruled that it would be unethical for Molinas to represent Reed." This is inaccurate, the judge had no power to make such a ruling. He merely suggested, as his personal opinion, that this might be the case. Petitioner was a duly admitted attorney, legally free to represent Reed or anyone else. If this proved to be unethical, it would be a matter for subsequent proceedings before the Appellate Division.

** At one point, after several hours of interrogation, Reed was taken by detectives for a brief consultation with a Legal Aid Society attorney (1858-61). He was then taken back for further questioning, still in the absence of his counsel (1862).

only agreed to cooperate because he could see "no other way. I mean I was frightened" (2075). Thereupon, he was granted immunity from prosecution (1853).

As noted above, however, Reed's testimony as an accomplice would have been legally insufficient to convict petitioner. Accordingly, the prosecutor decided to have Reed meet with petitioner and, with the aid of an electronic recording device which he supplied to Reed, surreptitiously record a conversation during the course of which Reed would attempt to extract incriminating statements. After Reed was equipped with a concealed recording device he was told to call petitioner and arrange for an immediate meeting at the latter's law office (1870, 1504).

The District Attorney suggested the type of conversation which Reed was to engage petitioner in, as well as the subjects to be covered (1865-7, 1876). Specifically, Reed was instructed to talk about perjury and "to find out where Mr. Molinas would stand in the event I committed perjury" (1867). Of course, the District Attorney already knew petitioner's position on this for Reed had related to him the conversation of the preceding evening during which petitioner had allegedly attempted to suborn perjury.

Reed went directly from the District Attorney's office to petitioner's law office and, in the guise of consulting him as his attorney, elicited incriminating statements from petitioner.* The surreptitiously-made tape recording provided the corroboration required to convict petitioner. Its use was not limited to supporting Reed's credibility on the attempted subornation of perjury charge. Rather, it was the essential mainstay of the conviction on all of the counts.

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* To lend credence to their scheme the prosecutor supplied Reed with a subpoena requiring his appearance before the Grand Jury on the following day (People's Exhibit 35, pp. 3-4).

Reasons for Granting the Writ

1. In *Miranda* v. *Arizona*, 384 U. S. 436, 469, this Court stated that its aim was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." While the decision was necessarily restricted to the factual situation presented —in-custody interrogation—it was dictated by the Court's continuing "concern for adequate safeguards to protect Fifth Amendment rights" (384 U. S. at pp. 457-458) and was merely "an application of principles long recognized and applied in other settings" (384 U. S. at p. 442).

The instant case provides this Court with the opportunity to decide whether the same basic principles are equally applicable to other more insidious forms of interrogation which have as their aim the extraction of self-incriminatory statements from a suspect who has not been warned that he is under interrogation or advised of his constitutional rights. More specifically, whether, when the mere act of taking the suspect into custody would instantly serve to alert him to exercise his right to remain silent, the prosecutor may strip the suspect of his right to choose between silence and speech by conducting his interrogation through an informer who is secretly recording the suspect's unguarded statements?

The decision of the court below is completely at odds with the "liberal construction" which this Court has always accorded to the Fifth Amendment privilege (*Spevack* v. *Klein*, 35 U. S. L. W. 4140, 4141; *Miranda* v. *Arizona*, *supra*).

Tactics such as those employed by the prosecutor in the case at bar are squarely in conflict with the accusatorial nature of our system of criminal justice, and violative of the privilege which "has always been 'as broad as the mischief against which it seeks to guard'" (*Miranda* v. *Arizona, supra,* at pp. 459-460).

The privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'. *Malloy* v. *Hogan,* 378 U. S. 1, 8" (*Miranda* v. *Arizona, supra* at p. 460). The question in each instance "is whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer" (*Garrity* v. *New Jersey,* 35 U. S. L. W. 4135, 4136).

Clearly, petitioner would never have incriminated himself had he been taken into custody and subjected to interrogation by police officers or known agents of the prosecutor. To succeed, the prosecutor's scheme required that petitioner be deceived, that he talk unguardedly to a "trusted" friend and client who was purportedly seeking legal advice, but in reality secretly recording petitioner's statements for use as evidence against him. This is precisely the type of interrogation which this Court condemned in *Massiah* v. *United States,* 377 U. S. 201, 206, where it held that the protection afforded by the right to counsel extends to "indirect and surreptitious interrogation as well as those conducted in the jailhouse."

If the prosecution is still permitted to secure incriminating statements from an accused who is the primary target of its investigation by indirect and surreptitious interrogation, the force of the decisions expanding and safeguarding the right to counsel and the right not to incriminate oneself would be nullified.

Finally, the unlawful manner in which the prosecutor coerced Reed to cooperate in extracting incriminating statements from petitioner violates due process (*Rochin* v. *California,* 342 U. S. 165, 169) and taints the evidence obtained thereby. The prosecutor flagrantly violated Reed's right to counsel and ruthlessly exploited the confidential relationship which existed between petitioner and Reed. The sanctioning of such "dirty" practices on the part of law enforcement officials and officers of the court, and the undermining of the confidential relationship between attorney and client poses a far greater threat to our society than petitioner's comparatively innocuous "fixing of basketball games".

Since the tactics disclosed in the case at bar are apparently still in widespread use by prosecuting authorities, a definitive statement by this Court as to their legality is urgently needed.

2. The introduction in evidence during petitioner's trial of the surreptitiously obtained tape recording raises "grave constitutional questions under the Fourth and Fifth Amendments" (*Lopez* v. *United States,* 373 U. S. 427, 441 [Warren, *C.J.*, concurring in result]).

In November, 1964 petitioner unsuccessfully sought to have this Court pass upon these questions and to decide whether *On Lee* v. *United States,* 343 U. S. 747, should be overruled (*Molinas* v. *New York,* 380 U. S. 907).

Subsequently in *Osborn* v. *United States,* 382 U. S. 1023, certiorari was granted on this identical question. The decision in *Osborn* (—— U. S. ——, 87 S. Ct. 429, 432-433), however, left the question open since the issue was "not the permissibility of 'indiscriminate use of such devices in law

enforcement', but the permissibility of using such devices under the most precise and distinct circumstances, circumstances which fully meet the 'requirement of particularity' which the dissenting opinion in *Lopez* found necessary".

The instant case furnishes this Court the opportunity to finally resolve this issue which has a vital effect upon law enforcement procedures throughout the country.

The prosecution's tactics in the case at bar readily distinguish it from *Osborn* and *Lopez* and are of the type expressly condemned by the Chief Justice. Thus, in addition to the violation of petitioner's Fifth Amendment rights, discussed above, the following factors are significant:

The case at bar	*The Lopez case*
a) The agent-accomplice gained entry into petitioner's private law office by deliberately misrepresenting his true purpose and purporting to seek advice with respect to his own involvement in the prosecution's investigation.	The agent truthfully disclosed that he was a federal agent conducting an investigation of petitioner's affairs.
b) The accomplice deliberately steered the conversation to topics suggested by the prosecutor, designed to elicit incriminating statements.	Petitioner made an unsolicited bribe offer to the agent.
c) But for the presence of the concealed recording device, petitioner took no risk in speaking freely to the accomplice-	Petitioner risked prosecution and conviction by offering an unsolicited bribe to a federal agent, since the

The case at bar	*The Lopez case*
agent, since a conviction cannot be obtained in New York on uncorroborated accomplice testimony.	agent's testimony would have sufficed to convict.
d) The recording of incriminating statements deliberately elicited from petitioner was sought not to protect the credibility of the accomplice-agent, but to furnish the prosecution with the lacking essential element of corroboration required by the law of New York.	The "only purpose" of the recording was to protect the credibility of the federal agent.

Moreover, in both *Lopez* and *Osborn,* the petitioners knew that they were speaking to law enforcement officers. Finally, in his dissenting opinion in *Hoffa* v. *U. S.*, —— U. S. ——, 87 S. Ct. 408, 421 n. 1, the Chief Justice again expressly noted his opposition to the "use of a secretly made recording other than for the purposes of corroborating the testimony of a witness who can give firsthand testimony concerning the recorded conference and who is made available for cross-examination." As noted above, but for the presence of the concealed recording device petitioner took no risk in speaking freely to Reed. *Lopez* and *Osborn* are thus distinguishable since both were federal prosecutions where the mere testimony of the agent, if believed, would suffice to convict.

While we do not recognize the constitutionality of the New York eavesdropping statute (N. Y. Code Crim. Pro. §813-a), a question presently before this Court in *Berger* v.

New York, 18 N. Y. 2d 638, cert. granted 35 U. S. L. W. 3201, the case at bar is also distinguishable from *Osborn* because the prosecution, although it had ample opportunity to do so, neither applied for nor procured prior judicial authorization for their surreptitious electronic eavesdropping.

3. On Friday, November 30, 1962 the trial judge excused the jurors with the perfunctory remarks, "Do not talk about the case. Do not form or express any opinion. You may retire" (2906). This 5-second recitation, however, left the jurors totally unprepared for the unexpected events which were to follow.

Over the weekend the judge was stricken with a kidney stone attack, and his subsequent hospitalization prevented resumption of the trial until January 2, 1963. During this five-week interval, the jury was dispersed and not under the control or guidance of the Court. The jurors returned to their respective jobs and otherwise resumed their daily normal routine. They did not know whether the case had been concluded or whether they might be recalled. They received no instructions on how to conduct themselves during a prolonged and indefinite interruption in the trial.

When the Court finally reconvened, and before any further testimony was taken, petitioner moved for a mistrial (2933-4, 2941). His motion was denied (2942) because "the People had extreme difficulty in bringing their witnesses to court, some being in military service, stationed at distant points, and others traveling about." (Opinion of Hofstadter, *J.*, granting certificate of reasonable doubt, 4/3/63.)

Petitioner's constitutional right to trial by an impartial jury competent to recall and evaluate all of the relevant

evidence does not depend upon the relative ease with which the prosecution can assemble its witnesses. The cost of possible prejudice during a criminal trial to the defendant is counted in years of his life and exceeds any amount which the State may be required to spend on a new trial. When an individual's liberty is at stake, our Constitution demands that the State accord him due process of law and take whatever steps are necessary to insure that he receives a fair trial. No court should accept the argument that it is inconvenient for the prosecution to insure the absolute fairness of a defendant's trial.

The question of constitutional law presented is a novel one and, while the custom and practice of many trial courts is to grant a mistrial under circumstances such as those presented by the instant case, there should be an expression of this Court on a matter so fundamentally affecting the rights of defendants in criminal jury trials.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS R. NEWMAN
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 11,560

UNITED STATES OF AMERICA *ex rel.* JACOB MOLINAS,

Relator,

—against—

ALBERT J. MEYER, as Acting Warden of Attica State Prison, Attica, State of New York,

Respondent.

Thomas R. Newman, New York City,
Attorney for Petitioner

Joseph J. Ricotta, Assistant Attorney General of New York; Frank S. Hogan, District Attorney of New York County, H. Richard Uviller and Alan F. Leibowitz, Assistant District Attorneys, of counsel

FINDINGS OF FACT

1. The petitioner is held on a judgment of the Supreme Court, New York County, entered February 11, 1963 following a jury verdict of guilty of crimes of conspiracy, three counts of bribery, and one count of attempted subornation of perjury. He was sentenced to an aggregate term of 10 to 15 years. On November 9, 1964 the court

modified the sentence by revoking the sentence imposed on Count 4 of the indictment and re-sentenced him nunc pro tunc to a term of 2 to 5 years on said count, which resentence was to run consecutively to the 5 to 7½ year sentences imposed on Counts 2 and 3. Thus modified, the petitioner must serve an aggregate of 7 to 12½ years.

2. The judgment was affirmed by the Appellate Division, 21 A. D. 2d 384. The Court of Appeals denied permission to appeal to that court. A petition for reargument was denied by the Appellate Division. The Supreme Court of the United States denied certiorari.

3. The petitioner claims that the judgment of conviction and sentence was obtained in violation of his rights under the Federal Constitution. Particularly he claims: (1) by the admission into evidence of incriminating statements elicited from him by means of a recording device concealed on the person of an accomplice pursuant to arrangement made with the prosecutor's office after petitioner had become a prime suspect of the prosecutor's investigation, in the absence of counsel and without prior warning of his constitutional right to remain silent, and not being even aware that he was under investigation; (2) he was deprived of a fair trial by the denial of his motion for a mistrial, and by the interruption of his trial after a four and one-half week interruption caused by the illness of the trial judge.

4. By order of this court dated September 21, 1965, the respondent was directed to show cause why a writ of habeas corpus should not issue, and to produce before this court for its examination the record of the proceed-

ings at the trial and the briefs of the respective parties in the Appellate Division. The presence of the petitioner was not required on the return of this order to show cause. Pursuant to that order the papers ordered to be produced have been produced, and are sufficient for this court to determine the questions presented. There is no need for a further hearing.

5. The petitioner was an All-American basketball player at Columbia University and a professional player in the National Basketball Association. He was also an attorney admitted to practice in New York. Over a period of four years, from 1957 to 1961, Molinas and his three partners, Wagman, Hacken and Green, entered into a conspiracy to control the outcome of college basketball games throughout the country.

6. One of the college basketball players bribed by Molinas was Reed, a player at Bowling Green University in Ohio. When the authorities began to uncover the details of the conspiracy, Molinas took steps to conceal his complicity and in March, 1961 he began to secure the cooperation of Reed to avert his arrest. Over the following months Molinas made two trips to Ohio to speak to Reed in person as well as maintain contact with him by telephone. Molinas instructed Reed to reveal nothing, but if called before the grand jury, to lie about the crimes. Molinas also told Reed to retain counsel and had Reed write a letter to him (Molinas) asking Molinas to serve as Reed's attorney. Reed wrote the letter as Molinas dictated it. In January, 1962 Reed was brought to New York to appear before the grand jury, and again Molinas instructed him to deny he had ever received money to fix games, from

Molinas. Reed, however, after consulting with Legal Aid attorneys, decided to cooperate with the district attorney and agreed to carry a recording device on his person. Reed then telephoned to Molinas and was asked to come to Molinas' law office. There Reed recorded a conversation in which Molinas instructed him how to lie to the grand jury without risking exposure, and Molinas further briefed him on the specific facts that Reed was to deny or not to remember. This recorded conversation took place on January 16, 1962.

7. The indictment was returned on May 15, 1962. Molinas was not under arrest when the incriminating statements complained of were made. Since Molinas was not under arrest, the prosecuting authorities were free to question him either directly or they could use an agent such as Reed.

8. Merely because Molinas was under suspicion for the crime of conspiracy he was not entitled to a lawyer when being questioned in the investigation of the crime. The failure to provide him with one, or to warn him of his right to counsel, did not render the statements made by him inadmissible in evidence. The instructions given by Molinas to Reed in themselves constituted the crime of attempted subornation of perjury.

9. The interval in the trial, occasioned by the illness of the trial judge, did not entitle the relator to a mistrial. On Friday, November 30, 1962, after five weeks of trial amounting to 2907 pages of the trial record, the court recessed until the following Monday. Over the weekend the judge was stricken with a kidney stone attack and his

hospitalization prevented the resumption of the trial for four and one-half weeks, until Wednesday, January 2, 1963. During this interval the trial was adjourned several times, although the jury was not reconvened for these motions. The intermission occurred during the defendant's presentation, a day and a half after the close of the People's case. Following the resumption one day was required to complete the testimony, the defendant putting one witness on the stand, the People countered with one rebuttal witness. Both sides then rested. Upon resumption of the case, the trial judge gave the jury appropriate instructions so as to allow the jurors to refresh their recollections. The defense was permitted to read to the jury any portion of the record which it was felt was necessary to recall. The jurors themselves were told they could have any testimony reread. The recapitulation of the testimony during both summations and in the court's marshaling of the evidence provided ample means to recall the evidence to the jury. There was no showing of prejudice by the interruption of the trial. The trial judge's denial of the motion for a mistrial, based upon the interruption of the trial, was a discretionary matter within the trial judge's jurisdiction. It should be given great weight in this proceeding.

Conclusions of Law

1. Incriminating statements made by Molinas while attempting to suborn perjury were properly admitted into evidence.

2. The incriminating statements made by Molinas as secured by the tape recording device and its admission into evidence did not infringe the petitioner's rights under the Federal Constitution.

3. The interval in the trial occasioned by the illness of the trial judge did not entitle Molinas to a mistrial. The denial of the motion for mistrial was not an infringement of the rights of Molinas under the Federal Constitution and did not amount to the denial of a fair trial.

4. The judgment of conviction and sentence under attack in this proceeding is a valid and legal judgment and was not procured in violation of the petitioner's rights under the Federal Constitution.

Petitioner's application for a writ of habeas corpus should be, and the same hereby is, denied upon the merits. It is hereby so ordered.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, N. Y., a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

HAROLD P. BURKE
U. S. District Judge

March 7, 1966.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 11,560

[SAME TITLE]

Thomas R. Newman, New York City,
Attorney for Petitioner

Joseph J. Ricotta, Assistant Attorney General of New York; Frank S. Hogan, District Attorney of New York County, H. Richard Uviller and Alan F. Leibowitz, Assistant District Attorneys, of counsel

On re-consideration, I hereby certify that there is probable cause for appeal.

HAROLD P. BURKE
U. S. District Judge

March 15, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 202—September Term, 1966.

(Argued November 28, 1966 Decided January 5, 1967.)

Docket No. 30554

UNITED STATES OF AMERICA *ex rel.* JACOB MOLINAS,

Petitioner-Appellant,

—v.—

VINCENT R. MANCUSI (successor to Albert J. Meyer), Warden of Attica State Prison, Attica, New York,

Respondent-Appellee.

Before:

FRIENDLY, SMITH and ANDERSON,

Circuit Judges.

Appeal from the denial of an application for a writ of habeas corpus in the United States District Court for the Western District of New York, Harold P. Burke, *Chief Judge.*

Affirmed.

THOMAS R. NEWMAN, New York, N. Y., *for petitioner-appellant.*

MICHAEL H. RAUCH, Asst. Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge*:

Jacob Molinas appeals from an order of the United States District Court for the Western District of New York, Harold P. Burke, *Chief Judge*, which denied his application for a writ of habeas corpus. Appellant is currently serving a seven to twelve and one-half year sentence in the Attica State Prison after conviction in the Supreme Court of the State of New York for New York County for conspiracy, bribery and attempted subornation of perjury. His petition alleged that the admission of a certain tape recording in his trial violated his Fourth, Fifth and Sixth Amendment rights and that a four and one-half week adjournment of his trial because of illness of the judge after five weeks of trial denied him due process as guaranteed by the Fourteenth Amendment. Finding no merit in appellant's appeal, we affirm the denial of the writ.

From 1957 to 1961, Molinas, a former college and professional basketball player and a member of the New York Bar, conspired with three associates and college players to control the scores of intercollegiate basketball games across the country. One of his co-conspirators was Dennis William Reed, a college player who had accepted bribes. In March of 1961 Molinas telephoned Reed that something was brewing but not to worry. After telephoning Reed in May 1961

Molinas went to Ohio to talk with Reed, told him of a grand jury investigation and advised him how to lie to the grand jury if called. That summer Molinas again visited Reed, then at summer school in Ohio, recommended that Reed retain Molinas as counsel and dictated a letter which Reed wrote and gave to Molinas asking Molinas to act as Reed's counsel. After a New York investigator interviewed Reed in Ohio, Reed telephoned Molinas that Reed was coming to New York to testify before the grand jury. Molinas met Reed, and had him sign another letter retaining Molinas as counsel and a paper purporting to exculpate Molinas. Molinas accompanied Reed to the District Attorney's office and to a court appearance where a judge ruled that it would be unethical for Molinas to represent Reed. Thereafter, although initially refusing to do so, Reed agreed to cooperate with the authorities. After receiving a grant of immunity, he made an appointment to see Molinas and subsequently went to the latter's office equipped with a concealed tape recorder. Purporting to seek legal advice, Reed elicited statements from Molinas about the conspiracy and the bribery, and during this session appellant attempted to suborn Reed's testimony before the grand jury. At Molinas' trial Reed related the substance of these statements; corroboration of his accomplice testimony which is necessitated by N. Y. Code of Crim. P. §399 was effected by playing the tape recording.

The government contends that appellant is barred from raising his Fourth Amendment claim because it was not passed on by the New York courts. At trial, defense counsel objected that admission of the tape recording "would constitute a violation of the defendant's constitutional rights under the United States Constitution." This broad phrasing adequately preserved appellant's rights under

New York law. See *People* v. *O'Neill*, 11 N. Y. 2d 148, 227 N. Y. S. 2d 416 (1962). However, on appeal to the Appellate Division, on application for leave to appeal to the Court of Appeals, on reargument of that application and on motion to reargue in the Appellate Division, appellant did not present his Fourth Amendment claim. It was first specifically asserted in his petition for certiorari to the United States Supreme Court. Hence, although on trial appellant preserved the Fourth Amendment claim for review, he did not pursue it through the appellate process. Therefore, the claim was not passed on by the appellate courts of New York and is not properly presented here. *Fay* v. *Noia*, 372 U. S. 391, 438-39 (1963). In any case, it is without merit. In *Lopez* v. *United States*, 373 U. S. 427 (1963), the Court upheld, over Fourth Amendment objections, the admissibility of a tape recording obtained by a government agent who purported to follow up previous bribes and, like Reed, carried a hidden tape recorder, was voluntarily admitted to the suspect's office and guided the conversation toward incriminatory remarks. See also *Z. T. Osborn, Jr.* v. *United States*, —— U. S. —— (slip op. Dec. 12, 1966); *United States* v. *Pardo-Bolland*, 348 F. 2d 316 (2d Cir. 1965), cert. denied 382 U. S. 944, 946 (1966); *United States* v. *Kabot*, 295 F. 2d 848 (2d Cir. 1961), cert. denied 369 U. S. 803 (1962). The distinction that the recording in *Lopez* was strategically useful to substantiate the agent's credibility and the recording here also was legally necessary to corroborate the accomplice testimony is immaterial. The attempted distinction that Lopez knew he was speaking to a federal officer whereas Molinas merely thought he was speaking to a co-conspirator is also without merit, for in *Osborn* v. *United States, supra*, Osborn likewise had no knowledge that Vick, who visited his office

with the concealed recorder, had at the time any connection with the federal authorities.

Unlike the Fourth Amendment argument, the Fifth and Sixth Amendment claims were passed on by the New York appellate courts, for, the claims were presented on application for leave to appeal to the Court of Appeals and on motion to reargue in the Appellate Division. Regarding the merits of his Fifth and Sixth Amendment claims, appellant apparently recognizes that any direct reliance on *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) and *Miranda* v. *Arizona,* 384 U. S. 436 (1966) is misplaced because his trial started in 1962 and *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), held that *Escobedo* and *Miranda* apply only to trials commenced after June 22, 1964 and June 13, 1966 respectively, the dates of those decisions. Hence, appellant relies not on the holdings of *Escobedo* and *Miranda* but rather on their supposed radiations and asks that their principles be applied to a suspect who is not in custody. Such an extension of *Escobedo* and *Miranda* is unwarranted. Appellant also attempts to draw support from *Massiah* v. *United States,* 377 U. S. 201 (1964); however, Massiah had been indicted. Although the state may have had sufficient evidence to indict Molinas, that is immaterial. Compare Mr. Justice Stewart's statement for the Court in *Hoffa* v. *United States,* —— U. S. ——, Dec. 12, 1966, slip op. p. 17, "There is no constitutional right to be arrested." While the Supreme Court recognized in *Miranda* that the self-incrimination clause of the Fifth Amendment protects only against compelled testimony, it presumed that all in custody interrogation involves elements of compulsion. Such a presumption cannot cover something said by a lawyer in the quiet of his own office. Cf. *United States* v. *Bottone,* 365 F. 2d 389, 395 (2d Cir.), cert. denied —— U. S. —— (1966). More-

over, this was no case of Molinas' testifying against himself; what he said was a crime itself. Also, it may be noted that the *Massiah* decision was handed down May 18, 1964 and because it involved issues similar to those in *Escobedo* and *Miranda* the *Johnson* date of decision rule may be expected to apply. Prior to *Johnson,* this court ruled that *Massiah* is not retroactive. *United States ex rel. Romano* v. *Fay,* 360 F. 2d 389 (2d Cir. 1966).

Appellant finally contends that the four and one-half week adjournment after five weeks of his trial which was caused by the trial judge's kidney stone attack and subsequent recuperation violated his right to due process under the Fourteenth Amendment. This contention must fall because appellant had not established that the adjournment was prejudicial. He has not shown that the jurors had difficulty recalling testimony or had forgotten their impression of the witnesses' credibility. In fact, the judge made available his copy of the minutes, granted the defense additional summation time, allowed it to read from the record and marshalled the evidence. Moreover, on several occasions the jury accepted the judge's offer to have portions of the record read. Appellant has not proved that either improper contact with the jury or unauthorized discussion of the case occurred.

The judgment denying petitioner's application for a writ of habeas corpus is affirmed.